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ELECTRONICALLY FILED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147; *Appropriate Framework of Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33.

Dear Ms. Dortch:

I write on behalf of AT&T Corp. ("AT&T") to address recent Bell Operating Company *ex parte* submissions that urge the Commission to make permanent the profoundly anticompetitive interim "use" restrictions on the loop/transport combinations known as "enhanced extended loops" or "EELs." Verizon, for example, suggests that merely by upholding the *interim* restrictions "while [the Commission] further studie[d] the issues,"[1] the D.C. Circuit somehow compelled permanent retention of those rules and "agreed" that there is no evidence that requesting carriers are impaired in their ability to provide long distance or exchange access service.[2] In fact, the D.C. Circuit ruled only that *if* the Commission *chooses* to engage in a service-by-service impairment analysis (and it need not do so), it should support unbundling requirements with record evidence that competing carriers are impaired in their ability to provide long distance and exchange access services without access to incumbent LECs' loops and

[1] *Competitive Telecommunications Ass'n* v. *FCC*, 309 F.3d 8, 16 (D.C. Cir. 2002) ("*Comptel*").

[2] January 30 Letter from William P. Barr, Verizon Executive Vice President and General Counsel, to Honorable Michael Powell ("*Verizon January 30 Ex Parte*").

transport.[3] And the record in these proceedings now unquestionably establishes such impairment with respect to exchange access and interexchange services. There is thus no lawful basis for *any* use (or "commingling") restriction, much less for the Bells' position that the Commission should retain existing restrictions that have been proven to prevent requesting carriers from converting to EELs even special access arrangements that are used to provide "a significant amount of local exchange service," *Supplemental Order Clarification* at ¶ 21.

That is why the Bells' recent use restriction advocacy, like their prior submissions, all but ignores the impairment inquiry that they concede is critical. On this record, there is simply no basis to argue that requesting carriers have alternatives to the incumbent LEC loop and transport facilities in question.[4] These transmission facilities are characterized by enormous economies of scale and scope, require the investment of substantial sunk costs,[5] and enjoy classic natural monopoly characteristics.[6] The record contains detailed engineering, economic, and operational data that show that requesting carriers have only very limited opportunities (on routes where traffic is very highly concentrated) to self-supply or to purchase high capacity loop and transport facilities from third parties.[7] And there can be no serious argument that an impairment analysis

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[3] The *CompTel* court expressly declined to assess whether "the Act as a whole []or § 252(d)(2)(B) in particular requires that impairment findings be service-by-service or that the UNE mandates be confined to services as to which such a finding has been made." *Comptel*, 309 F.3d at 12. Rather, the court "tr[ied] only to answer the question of whether the Act *bars* such service-by-service distinctions." *Id*. Thus, contrary to the incumbent LECs' claims, the *CompTel* decision merely *permits* a service-by-service inquiry; it does not require any such inquiry. And the court obviously did *not* prejudge the outcome of any such inquiry.

[4] *See, e.g.*, AT&T Reply at 179-87, 257-68; Sprint Reply at 26-31, 34-36; WorldCom Reply at 64-71, 122-34; XO Reply at 19-22; 12/12/02 Allegiance Ex Parte at 14.

[5] Robert D. Willig, "Determining 'Impairment' Using the *Horizontal Merger Guidelines* Entry Analysis" at 8-16 ("Willig *Guidelines* Ex Parte") (attached to 12/03/02 AT&T Ex Parte); AT&T Reply, Willig Reply Dec. ¶¶ 37-43.

[6] Willig *Guidelines* Ex Parte at 8-16; AT&T Reply, Willig Reply Dec. ¶¶ 19, 22; 1/10/02 Ex Parte Letter from Judge Robert Bork to Chairman Michael Powell at 2-6 ("Judge Bork Antitrust Ex Parte").

[7] *See, e.g.,* 11/25/02 AT&T Ex Parte, Att. A & B; Willig *Guidelines* Ex Parte. In particular, the economic and engineering evidence demonstrates that a competitive carrier can self-deploy transport at costs comparable to the incumbent LEC's costs only when the competitor has 18 DS3s or more of traffic and is able to self-deploy high capacity loops at costs comparable to the incumbent LEC's costs only when the competitive carrier has three or more DS3s of traffic. *See* 11/25/02 AT&T Ex Parte, Att. A & B. This assumes, of course, that competitive carriers are even able to get the necessary public and private rights-of-way and common space building

for loops and transport is any different for exchange access services (or interexchange services) than for local exchange services. The identical facilities are used to provide both services, and the practical difficulties in accessing or building alternative loop and transport facilities do not turn on whether the facilities are used to provide local exchange services, exchange access services or both.[8] The practical reality is that even when *all* potential sources of traffic are considered, there are very few instances in which competitive carriers can economically deploy loop and transport facilities. *A fortiori*, competitive carriers are even less able to deploy alternative facilities that would be used to provide *only* exchange access services.[9]

The Bells respond that requesting carriers *do* have alternatives: the Bells' own exorbitantly-priced special access services. But that is no answer at all, as the Commission has already twice held: "If we were to adopt the incumbents' approach, the incumbents could effectively avoid *all* of the 1996 Act's unbundling and pricing requirements by offering tariffed services that, according to the incumbents, would qualify as alternatives to unbundled network elements." *UNE Remand Order* ¶ 354 (emphasis added); *see also Local Competition Order* ¶ 287. The Eighth Circuit "agree[d]" that relieving incumbent LECs of unbundling requirements on the ground that a UNE's functionality could also be provided in the form of a wholesale service improperly "would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3)."[10] And in upholding this aspect of the Eight Circuit's decision, the Supreme Court held that the "impairment" inquiry must focus on whether a requesting carrier can offer service through "self-provision, or with purchase from *another carrier*."[11] But even if it could be appropriate to make a finding of non-impairment based upon the availability of other incumbent LEC services at non-cost-based rates, the record in this proceeding would preclude any such finding here. As AT&T and others have demonstrated, the Bells not only can, but already are, using their above-cost special access rates to create price squeezes that plainly impair the ability of requesting carriers to provide competing interexchange and exchange access services.[12]

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access at cost-based and non-discriminatory terms and conditions.

[8] AT&T Reply at 179-87, 257-68.

[9] It is precisely because local exchange and exchange access services "are inextricably interrelated" in this context, that it makes no sense even to engage in service-by-service impairment analysis. *See Supplemental Order Clarification* ¶ 14.

[10] *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 809 (8th Cir. 1997), *aff'd in part and rev'd and remanded in part on other grounds*, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)

[11] *Iowa Utils. Bd.*, 525 U.S. at 389-90 (affirming the Eighth Circuit) (emphasis added).

[12] *See*, *e.g.*, Petition of AT&T at 23-24 (filed RM No. 10593, Oct. 15, 2002) ("AT&T Special Access Petition") (attached to *Ex Parte* Letter from Robert Quinn to Marlene Dortch (filed Oct.

Because there is no basis for a finding that requesting carriers are not impaired in the provision of exchange access and interexchange services or otherwise for maintaining the interim use and commingling restrictions, Verizon now urges the most irresponsible course of all – continued inaction while the Commission "thoroughly explor[es]" whether to eliminate or modify the interim rules.[13] But the Bells have now had *years* to submit evidence supporting use restrictions generally and the interim rules in particular, and their failure to do so obviously cannot justify additional delay. When the Commission issued its *Supplemental Order* in November 1999, it promised "resolution" of the use restriction issue by June 30, *2000*.[14] Instead, the *Supplemental Order Clarification*, released on June 2, 2000, "extend[ed] the temporary constraint," so the Commission could "compile an adequate record on the legal and policy disputes presented."[15] That record has been compiled, and it is time for Commission action, not further delay designed only to give the Bells the continued benefit of anticompetitive rules that they cannot support. That is particularly true, because the anticompetitive effects of these restrictions are substantially *increasing* as the Bells receive interLATA authority under section 271 and raise the special access service rates that their exchange access and interexchange competitors must pay in response to "pricing flexibility" that the Bells claimed would be used to *reduce* rates to "meet competition."[16]

Nor is there any "policy" basis for extending the interim restrictions. The incumbents no longer even press the principal "policy" concern they raised in lobbying for the interim restrictions – *i.e.*, that competitors' use of EELs in lieu of special access would affect universal service.[17] Any such argument would be frivolous. There were never any universal service or other legitimate subsidies in special access at all. *See, e.g., Access Reform Order* ¶ 404 (Commission's "established practice" is that "special access will not subsidize other services"); *see also UNE Remand Order* n.994). And the *CALLS Order* removed implicit subsidies from switched access and placed them in a $650 million fund. *CALLS Order* ¶ 202-03. The only even

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16, 2002); *id.*, Ordover-Willig Dec. ¶¶ 64-69; AT&T Reply at 43-47 (filed RM No. 10593, Jan. 23, 2003) ("AT&T Special Access Reply") (attached to *Ex Parte* Letter from Frank Simone to Marlene Dortch (filed Jan. 30, 2003); *id.*, Ordover-Willig Reply Dec. ¶¶ 66-74.

[13] *See Verizon January 30 Ex Parte* at 2.

[14] *Supplemental Order* ¶ 2.

[15] *Supplemental Order Clarification* ¶ 1.

[16] As AT&T and other commenters have demonstrated in the Commission proceeding addressing AT&T's special access petition, the Bells special access markets exhibit *all* of the recognized hallmarks of unconstrained market power. *See*, *e.g.*, January 30, 2003 Letter from Frank S. Simone, Government Affairs Director, AT&T Corp. to Marlene Dortch (attaching AT&T's reply comments and declarations in Docket No. RM-10593).

[17] AT&T 12/23/03 Ex Parte at 9.

arguably plausible universal service claim that could ever have been made would have been a claim that, to the extent EELs were substituted for switched access, whatever subsidies remained in primary interexchange carrier charges ("PICCs") and carrier common line charges ("CCLCs") could be eroded at the margins, to the extent that the PICC and CCLC had not yet been phased out in favor of subscriber line charges ("SLCs"). *See CompTel*, 309 F.3d at 15-16. As of today, however, the PICC and CCLC have been almost completely phased out and eliminated, and therefore no one could seriously claim that repeal of the use restrictions would harm universal service.

Similarly, the Bells' claims that use restrictions are necessary to protect facilities-based competitors are as ironic as they are wrong. The entire purpose of the *Pricing Flexibility Order* was to allow the Bells to *collapse* the price umbrella and compete with facilities-based entrants directly on price. Indeed, the Bells told the Commission and the court of appeals that unless they were given the flexibility to "*reduce* their rates in lower-cost areas and offer the *same* volume and term discounts as their competitors," they would suffer "truly irreparable losses" in the form of business lost to competitors.[18] The Commission accepted these Bell representations when it adopted the *Pricing Flexibility Order*; and expressly stated its expectation that the Bells would use that pricing freedom to reduce special access rates in lower-cost areas, to match the lower rates charged by CLECs.[19] But the indisputable evidence is that the Bells have used pricing flexibility to *raise* their special access rates instead of to reduce them,[20] and it would be especially illogical and perverse, now that the Bells have maintained the price umbrella in defiance of Commission policy, for the Commission to retain the use restrictions (and thus the price umbrella) in the name of fostering "competition."[21] That explains why the Bells are now reduced to arguing that allowing the rich to continue to steal from the poor is good "policy"

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[18] *MCI WorldCom Inc.* v. *FCC*, Nos. 99-1395 *et al*., Brief of Intervenors BellSouth, SBC, Verizon, and Qwest in Support of FCC, at 11 (filed August 4, 2000) (emphasis added).

[19] *See*, *e.g., Pricing Flexibility Order* ¶ 154.

[20] *See* AT&T Special Access Petition, RM No. 10593, filed October 15, 2002.

[21] Moreover, Verizon's claimed concern for its facilities-based competitors (at 8) only further confirms that competitive carriers are impaired absent loop-transport UNE combinations. Elimination of use restrictions could threaten existing facilities-based special access providers only if their costs are substantially above the Bells' costs of providing special access services. To the extent that existing special access providers entered at costs comparable to the Bells, making loop-transport combinations available at cost-based rates would not "undercut[]" these carriers. *Id.* In short, in advancing this argument, Verizon acknowledges that much of the limited facilities-based entry that has occurred to date is, economically speaking, "wasteful" and was enabled only by the existence of the Bells' supracompetitive pricing umbrella.

simply because the Bells have come to rely upon the monopoly special access profits that are protected by insupportable use limitations.[22]

But even if, contrary to fact, there were a legitimate basis for *some* restriction reasonably tailored to ensure that EELs are used to provide "a significant amount of local exchange service," *Supplemental Order Clarification* at ¶ 21, it is quite clear that the existing rules and "safe harbors" are *not* reasonably tailored to serve that goal and instead have allowed the Bells to refuse to convert special access arrangements even when circuits *are* used to provide a significant amount of local exchange service. In this regard, there is no substance to the Bells' last-minute claims that the existing "safe harbors" are functioning as intended and that competitive carriers are experiencing no difficulties satisfying the safe harbor requirements.[23]

To begin with, as AT&T has shown, AT&T obtains virtually all of its connectivity from ILECs at the DS1 level and above as special access, not as EELs. *See* Pfau Reply Decl. ¶ 26 n.10. AT&T has been able to convert special access circuit to EELs *only* in New York, where the State commission has adopted its own rules governing EEL conversions that *supplant* the Commission's unworkable safe harbors.[24] Indeed, wherever the Commission's safe harbors apply, AT&T has virtually no EELs at all.

That is because small and large carriers alike have demonstrated that it is all but impossible to demonstrate compliance with the existing safe harbors, even when the requesting carrier is in fact providing a significant amount of local exchange service on the circuit in question. For example, the second and third safe harbors require extremely precise certifications concerning the mix of local and long distance traffic on each affected circuit (and, indeed, on each link of each circuit). As a result, the only way to determine whether any particular circuit qualifies for conversion to an EEL is to commission very expensive, indirect processes of traffic measurement – which no carrier would otherwise undertake and that even if undertaken could only establish compliance at a given point in time. The first safe harbor, which allows a carrier to convert special access to EELs if it certifies that it is the "exclusive" provider of local service to that customer, is also practically impossible to satisfy, as the record confirms. Most large to mid-sized business customers choose AT&T's (or another CLEC's) local service to take advantage of network diversity. In other words, these customers perceive an advantage in having *multiple* local carriers to ensure connectivity in the event of temporary constraints or problems.

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[22] *See*, *e.g.*, *Verizon January 30 Ex Parte* at 2.

[23] *See*, *e.g.*, December 23, 2002 Letter from Joan Marsh, AT&T Corp., to Marlene Dortch (demonstrating that both use and commingling restrictions should be eliminated).

[24] *See Proceeding on Motion of Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements*, Case 98-C-0690, 1999 N.Y. PUC LEXIS 394 ("*NYPSC EEL Order*").

These are sophisticated customers that demand the flexibility to adjust the amount of service purchased from any one provider and the number of providers they use, in order to obtain the most advantageous mix of price, quality, and service at any one time.[25] That is why, outside New York where the Commission's safe harbors have fortunately become irrelevant, there is no significant conversion of special access circuits to EELs. The record in this proceeding overwhelmingly establishes that the existing safe harbors are entirely ineffective and fail to accomplish even their stated rationale of preventing the conversion of special access circuits to EELs only with respect to circuits that are not used to provide a significant amount of local services.

SBC, joined by three "small" competitive carriers (together, "SBC"), effectively recognizes as much in a February 7 *ex parte*.[26] There, SBC concedes that carriers could "satisfy their evidentiary burden of establishing compliance with the 'significant local use' requirement on a LATA-by-LATA basis if they have (1) obtained CLEC certification to provide local services and in fact offer local services in the LATA; (2) established collocation . . . arrangements in the relevant LATA; and (3) obtained sufficient local interconnection trunks within that LATA to demonstrate that they are using EELs to provide a significant amount of local services in the LATA to their customers." *February 7 SBC Ex Parte* at 3-4. SBC concedes that by meeting these conditions – and without satisfying the overly restrictive traffic measurement or customer certifications embodied in the existing safe harbors – a carrier would establish "a reasonable likelihood that a significant amount of local traffic is carried on given EEL facilities." *Id*. at 4.

In a particularly unlawful twist, however, SBC urges the Commission to make these new conditions available only to "small" carriers and to continue to hold "large" carriers such as AT&T hostage to the existing safe harbors that have been proven to be arbitrary and overly restrictive and that cannot be met in practice. Of course, any such brazen attempt "to aid the minnows against the trout, such as AT&T and MCI," *United States* v. *Western Electric*, 900 F.2d 1231, 1243 (D.C. Cir. 1992), would be patently unlawful. Indeed, "affording different treatment

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[25] *See*, *e.g.*, AT&T 4/5/01 Use Restrictions Comments, Carroll-Rhodes Decl. ¶ 15 n.7. Similarly, Cbeyond just recently emphasized that business customers often want more than one local service provider, and thus that satisfying the first safe harbor (*i.e.*, exclusive local provider) is not feasible in practice. *See* December 16, 2002 Letter from Julia Strow, Cbeyond, to Marlene Dortch at 3 ("many customers find a redundancy value (reliability assurance and competitive pressure) in having more than one telecommunications provider"). And even if a carrier could somehow demonstrate compliance with the safe harbors, conversion of special access to EELs is usually thwarted by the ban on commingling.

[26] *See* February 7, 2003 Letter from James C. Smith, Senior Vice President, SBC Telecommunications, Inc. *et al.* to Marlene Dortch ("*February 7 SBC Ex Parte*").

to similar situations is the essence of arbitrary action."[27] The courts have therefore repeatedly held that the Commission may not discriminate among similarly situated carriers in order to give an advantage to a preferred class of carriers.[28] Here, SBC's proposal is patently discriminatory, excusing "small" competitive carriers (and the Bells themselves) from the onerous "safe harbor" rules that would then apply only to "large" carriers. Indeed, on February 5, 2003, only two days before the SBC proposal, the few "small" LECs that join SBC themselves stressed that "the current restrictions" (and, indeed, the incumbents' "more recent attempts to craft a gating mechanism") are "over inclusive,"[29] thus giving the lie to their February 7 claim that applying the current "over inclusive" rules only to "large" CLECs would subject "small" and "large" carriers "to the same underlying legal standard." *February 7 SBC Ex Parte* at 3.[30]

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[27] *Copper Valley Machine Works, Inc.* v. *Department of Interior*, 653 F.2d 595, 607 (D.C. Cir. 1981); *see also Garrett* v. *FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (an agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways").

[28] *SBC Communications Inc.* v. *FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors"); *Competitive Telecommunications Ass'n* v. *FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996) (striking down "interim" rule designed to protect smaller IXCs at expense of AT&T); *Western Union Tel. Co.* v. *FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) ("equalization of competition is not itself a sufficient basis" for discrimination). *See also* Memorandum Op. and Order, *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, 12 FCC Rcd. 22,280, ¶ 16 (1997) (the "Commission's statutory duty is to protect efficient competition, not competitors").

[29] February 5, 2003 Letter from John J. Heitman, Kelley Drye & Warren (on behalf of NuVox, SNiP LiNK and others) to Marlene Dortch at 1.

[30] None of the Commission decisions that SBC cites as authority for "lessen[ing] regulatory burdens on small entities," *February 7 SBC Ex Parte* at 5, remotely justifies the discriminatory treatment SBC proposes here. *See* Memorandum Opinion and Order and Second Report and Order, *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 17 FCC Rcd 9614 ¶ 180 (2002) (allowing *all* licensees, large and small, to "partition" spectrum on theory that this would encourage the participation of smaller entities); *id.* ¶¶ 251-52 (establishing license "bidding credits" to "very small" businesses, but subjecting all successful bidders to the same substantive regulations); Order on Reconsideration, *2000 Biennial Regulatory Review*, 17 FCC Rcd. 4766 ¶ 11 (2002) (reducing "accounting and reporting requirements" for all incumbent LECs against background rules that required less detailed reporting by "Class B" carriers, but making no differential changes in non-accounting rules); Report and Order, *Biennial Regulatory Review et al.*, 14 FCC Rcd 11396 ¶¶ 11-14 (1999) (same); Second Report and Order and Third Notice of Proposed Rule Making, *Review of the*

SBC claims a "cost" rationale for this discrimination, but its claim is a baseless and entirely unsupported fabrication. In particular, SBC claims that demonstrating compliance with the existing safe harbors requires the expenditure of unspecified "fixed costs" that "large" CLECs can afford, but that "small" CLECs cannot. Compliance with the safe harbors does require large – indeed, cost prohibitive – expenditures, but those costs are in no way "fixed" or borne disproportionately by small carriers. To the contrary, as noted above, the safe harbors involve extremely precise certifications concerning the mix of local and long distance traffic *on each affected circuit*. The only way to determine whether any *particular* circuit qualifies for conversion to an EEL is to undertake very expensive measurement processes with respect to that circuit. The "safe harbors" thus impose not "fixed" costs, but substantial costs that vary with the number of circuits and customers served by a carrier. For that reason, measuring the traffic mix on 1,000 circuits is not materially less expensive *per circuit* than measuring the traffic mix on 100 circuits. "Large" CLECs thus have no meaningful advantage over "small" CLECs in terms of demonstrating compliance with the safe harbors.

Indeed, until this particular *ex parte* letter, "small" CLECs – including the few that now support SBC's proposal – have consistently recognized that the existing use restrictions are severely anticompetitive for reasons that have nothing to do with the size of the requesting carrier. For example, as NuVox and SNiP LiNK correctly noted in their reply comments (at 51), "the 'safe harbors' are too cumbersome" and "amount to a mad science that challenges network engineers, marketing personnel and provisioners – and leaves far too much opportunity for creative interpretation by the ILECs." As NuVox, SniP LiNK and others have noted recently, the safe harbors' reliance on percentages of local voice traffic unreasonably discourages broadband competition, because CLECs increasingly compete with ILECs to provide bundles of voice and data traffic in an integrated offering.[31] And Cbeyond also recognized that reliance on percentages of voice traffic per circuit is also increasingly outdated as carriers continue to migrate to packet-switched networks.[32] These inherent flaws in the safe harbors hamper "large" CLECs as much or more than they do "small" CLECs.[33]

Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 ¶¶ 165-70 (rel. Nov. 20, 2002) ("we reject as unsupported in the record any suggestion that the Rule we adopt today imposes unreasonable burdens on small broadcasters").

[31] *See, e.g.,* NuVox/SNiP LiNK 1/10/03 Ex Parte at 2-3; NuVox 1/23/03 Ex Parte at 1-3.

[32] Cbeyond 12/16/02 Ex Parte at 2-3.

[33] *See also* ALTS/NuVox/SNiP LiNK 12/19/02 Ex Parte at 8 ("*We do not endorse any percentage of local traffic requirement* because the ILECs don't have one and the requirement would entail *measurement and auditing problems*" (emphasis in original)).

And notably in this regard, "small" CLECs have advantages over "large" CLECs. For example, the use restrictions and safe harbors apply only to conversions of existing special access circuits. As a result, the safe harbors have a disproportionate impact on "large" CLECs like AT&T that had a much larger embedded base of special access circuits when the use restrictions were adopted in 2000. "Small," start-up CLECs – who have little or no embedded base of special access circuits and can order EELs as "new" UNE combinations – are much better positioned to avoid the safe harbors altogether, and thus have a substantial advantage over "large" CLECs.[34]

If SBC's theory were correct, one would expect to find AT&T and other "large" CLECs using the safe harbors to convert and obtain substantial amounts of EELs today to a much greater extent than "small" CLECs. The reality is the exact opposite. As shown above, AT&T obtains essentially all of its connectivity from ILECs at the DS1 level and above as special access, not as EELs, *see* Pfau Reply Decl. ¶ 26 n.10, and virtually all of AT&T's EELs are in New York, where the State commission has supplanted the Commission's safe harbors with its own rules.

SBC cites two sources for the proposition that the current safe harbors are workable for "large" CLECs, but neither source supports its claim. First, SBC relies heavily on the D.C. Circuit's statement that "the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *See* Letter at 2 (quoting *CompTel*, 309 F.3d at 17). The only "evidence" that the Commission "produced" to the court, however, was footnote 42 of its decision in *Net2000 Communications, Inc.* v. *FCC*, 17 FCC Rcd. 1150 (2002) ("*Net2000 Decision*"), in which it noted that Verizon had accepted some (but not all) of Net2000's requested conversions.

There are two obvious problems with this "evidence" for present purposes. First, Net2000 is a "small" CLEC. There was no evidence before the court that *any* "large" CLECs had converted special access circuits to UNEs, and as noted, the indisputable *fact* is that AT&T has converted virtually *no* special access circuits to EELs outside of New York. The court's statement certainly cannot be taken as an endorsement of the proposition that "large" carriers can show compliance with the safe harbors while "small" carriers cannot.

Second, as the *Net2000* decision itself makes clear, the fact that Verizon accepted *some* of Net2000's requested conversions does not mean that Net2000 either did or even could have *demonstrated* compliance with the safe harbors. As the Commission explained, the

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[34] Cbeyond itself recently confirmed this. *See* Letter from Julia Strow (Cbeyond) to Marlene Dortch (FCC), at 1 nn.2-3, dated December 16, 2002 (Cbeyond uses EELs today in Atlanta, Dallas, and Denver, but "[i]n all three markets, Cbeyond has, except in a limited circumstance, purchased new EELs and has not had to first order as special access and then convert under the [*Supplemental Order Clarification*]").

Supplemental Order Clarification requires that, "'once a requesting carrier certifies that it providing a significant amount of local service,' an ILEC *must* begin processing the requests without delay." *See Net2000 Decision* ¶ 23; *Supplemental Order Clarification* ¶ 30. In other words, the Commission's orders prohibit ILECs from conducting a "pre-audit" or otherwise second-guessing a CLEC's self-certification at the time of ordering. *Net2000 Decision* ¶ 23. Instead, the ILEC is limited to periodic audits if the ILEC can demonstrate a concern that the requesting carrier has not satisfied the safe harbors. *Supplemental Order Clarification* ¶ 31. Accordingly, the fact that Verizon initially accepted some of Net2000's requested conversions (*i.e.*, the ones that did not, on their face, independently violate the ban on commingling) does not mean that Net2000 could ultimately have demonstrated that these circuits fell within the safe harbors (even if they in fact did).[35]

SBC next cites an assertion in the *Verizon January 30 Ex Parte* that "CLECs have obtained more than 400,000 voice-grade equivalent circuits as EELs [in the Verizon region], including more than 200,000 in the last year." *See SBC January 7 Ex Parte* at 3 n.1. Verizon provides no relevant statistics regarding special access *conversions* to EELS, however, and the reality is that the conversions that have taken place have been in New York, where the State commission has supplanted the FCC's unworkable safe harbors with an entirely different test. The fact that CLECs have obtained EELs in New York does not demonstrate that carriers are able to demonstrate compliance with the *Commission's* safe harbors.[36]

SBC also suggests (at 4) that "large" CLECs "by virtue of their greater resources and market share, and as the largest purchasers of ILEC access services, have a greater incentive and potential than smaller carriers to thwart the objectives of EEL restrictions." If SBC is suggesting that "large" CLECs are more likely to "cheat," the facts once again belie the claim. The record demonstrates that AT&T has not converted *any* special access circuits to EELs (outside of New York), nor has it submitted any self-certifications for such conversions. To the contrary, the record demonstrates that it is the "small" CLECs that have submitted broad self-certifications of compliance with the safe harbors, which has led to extensive litigation between the ILECs and these "small" CLECs.[37] "Large" CLECs plainly have *less* opportunity to cheat. Precisely because they are the largest purchasers, their requests are far more likely to be audited.

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[35] In all events, by the time the Commission ruled in favor of Verizon on the disputed circuits in the *Net2000 Decision* (*i.e.*, upholding Verizon's claim that the disputed circuits violated the ban on commingling), Net2000 was already in bankruptcy.

[36] Even if these EELs were not limited to New York, the Barr letter undermines SBC's claim that there is an inherent difference in the ability of "large" and "small" CLECs to comply with the safe harbors, because the letter makes clear that "[m]ore than a dozen CLECs, *large and small*, have converted special access circuits to EELs." *Id*. at 5 (emphasis added).

[37] Verizon has expressly made this charge against "small" CLECs. *See Verizon January 30 Ex*

In short, there is no material difference between "large" and "small" CLECs with respect to showing compliance with the Commission's current unworkable safe harbors. SBC's current proposal is therefore a transparent attempt to impose uniquely onerous terms on "large" CLECs like AT&T that neither incumbent LECs nor their "small" (and therefore less threatening) competitors must bear. Accordingly, the SBC proposal is patently unlawful.

Finally, Qwest affixes a "streamlined" safe harbor label to a use restriction proposal that would, in fact, be significantly *more* restrictive and overinclusive – and therefore more arbitrary – than even the existing interim rules. *See* February 6 Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene Dortch. Qwest does not even mount a substantive defense of its "streamlined alternative," and with good reason. The current interim rules contemplate a certification that the circuit is a used to provide a "significant" amount of local traffic. Qwest's proposal, however, would require a certification that the circuit is used *primarily* for local service (*i.e.*, "carries at least 51% local traffic").[38]

Qwest would then have the Commission radically restrict what counts as "local" traffic that could satisfy the new, much higher threshold. For example, only traffic routed through a Class 5 switch could count, notwithstanding that AT&T and other carriers can, and do today, switch local traffic, including local voice traffic, through Class 4 and "soft" (or packet) switches. Qwest would also exclude *all* Internet traffic, even traffic that is directed to a caching or other server in the same LATA and therefore is indisputably local, as well as dial-up Internet access calls placed by ILEC customers to ISP customers of CLECs, which are treated by the ILECs as "local" calls for purposes of their own tariffs. And through new requirements that each EEL facility have "911" capabilities, a local number assignment, and porting capability, Qwest would totally exclude facilities used to provide local data services in all cases. Qwest would even add entirely undefined new "marketing" and "advertising" restrictions that would further enhance the incumbents' discretion to refuse to provide EELs.

Parte at 5-6 ("some requesting carriers have gamed the existing rules by self-certifying compliance with the Commission's safe harbors, even in circumstances where the circuits at issue on their face did not satisfy the clear requirements of the Commission's rules . . . whenever Verizon's practices in this regard have been challenged – formally or informally – Verizon has prevailed"). *See also* NuVox 2/5/03 Ex Parte (acknowledging that the Georgia Public Service Commission has issued an order permitting BellSouth to audit NuVox's claims to have satisfied the safe harbors).

[38] Qwest would retain the alternative of a CLEC certifying that it is the end user's "exclusive local provider, but that safe harbor is arbitrary and over inclusive for the reasons stated above and in AT&T's prior use restriction submissions.

All of this would be accompanied by a host of intricate, circuit-by-circuit recordkeeping and proof requirements designed to make it impossibly burdensome and expensive for any requesting carrier to dare attempt to take advantage of the proposed safe harbors, as well as onerous penalties that would be triggered if a burdensome audit (which would be governed by self-serving terms to be defined later by Qwest and unilaterally added to its SGATs) determined that the CLEC's traffic fell below the arbitrary new thresholds *at any time*. In other words, Qwest would preserve the most serious defects in the existing interim rules, such as the practically infeasible traffic measurement requirement, and then add a series of new barriers designed to shut down even the trickle of EELs conversions that have been possible under the existing rules.[39] Qwest has proffered rules that could be attractive only to those that seek to impede competition, to reduce CLEC incentives to invest in the expansion of their own competing facilities-based local voice and data networks, to restrict access to EELs without regard to whether they are used to provide a significant amount of local traffic, and to maximize the likelihood of reversal on appeal.

Respectfully submitted,

/s/David L. Lawson

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[39] AT&T assumes that Qwest proposes the arbitrary new restrictions to apply only to attempts to convert existing special access arrangements to EELs. If, in fact, Qwest proposes to cover additional cases, such as the purchase of "new" combinations or the ability to use or convert loop-only or transport-only special access functionalities to UNEs, the harms inherent in its proposal would, of course, be even greater.

DLL:pab

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